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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1128

CONSOLIDATED COPPERSTATE LINES, *Appellant*

vs.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ARKANSAS-BEST FREIGHT SYSTEM, INC.; GORDONS TRANSPORTS, INC.; BRASWELL MOTOR FREIGHT LINES, INC.; CENTRAL FREIGHT LINES, INC.; RED BALL MOTOR FREIGHT, INC.; SAIA MOTOR FREIGHT LINES, INC.; HERRIN TRANSPORTATION CO.; and RYDER TRUCK LINES, INC., *Appellees*

On Appeal From The United States District Court For The Central District of California

Motion To Affirm

MAURICE E. HIBBERT
WARREN N. GROSSMAN
KNAPP, GILL, HIBBERT & STEVENS
825 City National Bank Building
606 South Olive Street
Los Angeles, California 90014

LAWRENCE A. WINKLE
BRASWELL MOTOR FREIGHT LINES, INC.
Post Office Box 3989
Dallas, Texas 75208

M. WARD BAILEY
T. S. CHRISTOPHER
CHRISTOPHER, BAILEY & TAYLOR
2412 Continental Life Building
Fort Worth, Texas 76102
Attorney for Appellee, Braswell Motor Freight Lines, Inc.

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

INDEX

	Page
MOTION TO AFFIRM	1
STATEMENT OF THE CASE	2
AUTHORITIES AND ARGUMENT	5
CERTIFICATE OF SERVICE	8

INDEX OF AUTHORITIES

Page

Alton R. Co. vs. United States, 315 U.S. 15 5

Gilbertsville Trucking Company vs. United States, 371 U.S. 115 5

Interstate Commerce Commission vs. Parker, 326 U.S. 60 5

Mississippi Valley Barge Line Co. vs. United States, 292 U.S. 282 5

Rochester Telephone Corp. vs. United States, 307 U.S. 125 5

United States vs. Detroit and C. Nav. Co., 326 U.S. 236 5

U. S. vs. Pierce Auto Freight Lines, 327 U.S. 515, 536 5

Virginian R. Co. vs. United States, 272 U.S. 658, 668 6

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Motion To Affirm

Pursuant to Rule 16.1(c) of the Rules of this Court, intervening defendant, Braswell Motor Freight Lines, Inc., appellee herein, hereafter called appellee or Braswell, moves to affirm the judgment of the United States District Court, Central District of California[1], a statutory court of three Judges[2], affirming the decision of the Interstate Commerce Commission[3], and as grounds for such motion says:

THAT IT IS MANIFEST THAT THE QUES-

[1] Not yet reported but copy attached to Appellant's Jurisdictional Statement as Appendix A.

[2] An action under 28 U.S.C. 1336, 1398, 2284, 2321-2325.

[3] Reported at 104 M.C.C. 297.

TIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

STATEMENT OF THE CASE

The statement of the case as made by the court below is so accurate and comprehensive that we here adopt it as follows:

"Primarily involved are the purchases of operating rights of two companies, England Transportation Company, a Louisiana corporation, and England Transportation Company of Texas, a Texas corporation. These two companies ceased operations in 1964 due to failure to consummate a new labor agreement, and they placed their operating authority and equipment for sale at public auction. The plaintiffs, Consolidated Copperstate Lines and Strickland Transportation Co., Inc., were two successful bidders.

"The statutes involved are §§5(2)(a)(i), 5(2)(b), 207 and 210a(b) of the Interstate Commerce Act [49 U.S.C. §§5(2)(a)(i), 5(2)(b), 307 and 310a(b)].

"Section 5(2)(a) provides the basic permissibility for carriers to acquire control of other carriers.

"Section 5(2)(b) sets forth procedures and standards for Commission approval of such transactions.

"Section 207 provides for the grant of a certificate authorizing common carrier operation upon suitable findings of the public convenience and necessity.

"Section 210a(b) provides for the issuance of tem-

porary authority for one motor carrier to operate or lease the rights of another carrier.

"In its §5 purchase application, Copperstate sought to obtain through the purchase of a portion of the rights of England Transportation Company of Louisiana (England, La.), and England Transportation Company of Texas (England, Tex.), more direct routes from its western and southwestern service territory to points in Texas and to penetrate the New Orleans, Louisiana, service territory by providing service between New Orleans and Houston, Texas. Copperstate also filed an application for authority under §207 for an extension of the rights it sought to acquire.

"By its §5 purchase application, Strickland[4] sought to obtain through the purchase of England (La.) a competitive, direct north-south route between its present east and northern service territory, on the one hand, and, on the other, New Orleans—from Texarkana, Texas, through Shreveport, Louisiana. Also, in a §207 application, Strickland sought to convert a portion of the England (La.) rights from irregular-route authority to regular-route authority.

"Temporary authority to operate the rights of the England Companies was granted by the Commission in September 1964 and both Strickland and Copperstate commenced operation the following month.

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[4] Strickland Transportation Company, Inc., appeal to this Court is pending under this Court's Docket No. 1141. They are companion cases decided by the Commission in one report and order and determined by the District Court, Central District of California (a statutory court) in one decision.

"Both Copperstate and Strickland sought approval before the Commission and were given temporary authority to operate under the England rights pending final order of the Commission. The hearing examiner recommended, generally, approval of the applications, but the Commission, with four dissenters, denied the applications. In reversing the examiner's recommendation, the Commission, upon substantial evidence, found (1) that both Copperstate and Strickland were relying on past operations unlawfully performed by the England Companies in violation of the terms of their certificates, (2) that to the extent such past operations had been unlawfully performed, they would not be considered as probative of the public interest, (3) that both Copperstate and Strickland, as well as the England Companies, had performed so-called cross-hauling in violation of their certificates, (4) that Strickland had unlawfully managed and controlled certain rights of England (La.) prior to the Commission's approval of the temporary lease arrangement, (5) that both purchase proposals were so different from that service lawfully rendered as to constitute a new service for which the public convenience and necessity must be proved, (6) that neither carrier had borne its burden of proof in showing a need for the new services, and (7) that neither Strickland nor Copperstate was entitled to any special consideration under the doctrine of color-of-right or because of an overriding public interest.

"Before the Commission's orders became effective, this action was filed. A temporary injunction and

interlocutory judgment have stayed the effective date of the Commission's orders."

AUTHORITIES AND ARGUMENT

Appellant presents three questions which appellant says are so substantial as to require "plenary" consideration by this Court. The fact is, however, that each question presented (J.S. p. 3) involves fact issues, all of which were fairly and reasonably determined by the Interstate Commerce Commission. Appellant's argument as to all three alleged substantial questions clearly shows that the only thing involved here is appellant's disagreement with the Commission about the facts.

But what appellant overlooks or chooses to ignore is that the Commission is the final arbiter of the facts and the conclusions to be drawn therefrom, for Congress has intrusted that function and duty to the Commission, not the courts. In a case of this kind, judicial review is "limited to consideration of whether they have a rational basis and are supported by substantial evidence." *Gilbertsville Trucking Company vs. United States*, 371 U.S. 115; *U. S. vs. Pierce Auto Freight Lines*, 327 U.S. 515, 536; *Interstate Commerce Commission vs. Parker*, 326 U.S. 60; *United States vs. Detroit and C. Nav. Co.*, 326 U.S. 236; *Alton R. Co. vs. United States*, 315 U.S. 15; *Rochester Telephone Corp. vs. United States*, 307 U.S. 125; *Mississippi Valley Barge Line Co. vs. United States*, 292 U.S. 282; and many others. And of course the court may not substitute its own findings and judgment for

that of the Commission. That very thing is exactly what appellant here seeks.

In appellant's third question, asserted to be of substantial importance, it said that the Commission "acted arbitrarily in failing to follow the guidelines set forth in Consolidated Freightways Corporation of Delaware—Control—Southern Plaza Express, Inc., 104 M.C.C. 194." (J.S. p. 3).

We suppose that this is asserted as a conflict of decision relied upon to give this Court jurisdiction. But this overlooks the fact that cases of this kind are determined on the facts of each particular case and the conclusions to be drawn therefrom.

In any event, "The argument urged . . . is appropriate for consideration by the Commission and has presumably been duly considered by it. The fact that it has not proved persuasive *affords no basis for the contention that the Commission's action in making the order was arbitrary or otherwise illegal.*" *Virginian R. Co. vs. United States*, 272 U.S. 658, 668.

Again in *Virginian R. Co.'s* case, supra, this Court said: "This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, *or with the alleged inconsistency* with findings made in other proceedings before it."

All of appellant's complaints merely show that it is dissatisfied and quite unhappy with the findings and conclusions of the Commission and of the trial court, but, as heretofore pointed out, the Commission, not the courts, is the arbiter of evidence and where, as

here, the findings of fact, supported by evidence, and the conclusions are based upon statutory criteria (and the overriding National Transportation Policy), this Court has never interferred with the Commission's orders. Authorities as cited supra.

Appellee, Braswell Motor Freight Lines, Inc., respectfully submits that the judgment of the District Court should be affirmed, and so prays.

Respectfully submitted,

MAURICE E. HIBBERT
WARREN N. GROSSMAN
KNAPP, GILL, HIBBERT
& STEVENS
825 City National Bank Building
606 South Olive Street
Los Angeles, California 90014

LAWRENCE A. WINKLE
BRASWELL MOTOR FREIGHT
LINES, INC.
Post Office Box 3989
Dallas, Texas 75208

M. WARD BAILEY
T. S. CHRISTOPHER
CHRISTOPHER, BAILEY
& TAYLOR
2412 Continental Life Building
Fort Worth, Texas 76102

Attorney for Appellee,
Braswell Motor Freight Lines, Inc.

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October Term, 1968

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CONSOLIDATED COPPERSTATE LINES,
Appellant

VS.

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BRASWELL MOTOR FREIGHT LINES, INC.,
CENTRAL FREIGHT LINES, INC.,
RED BALL MOTOR FREIGHT, INC.,
SAIA MOTOR FREIGHT LINES, INC.,
HERRIN TRANSPORTATION CO., and
RYDER TRUCK LINES, INC.,
Appellees.

CERTIFICATE OF SERVICE

I, T. S. Christopher, attorney for Appellee, Braswell Motor Freight Lines, Inc., and a member of the Bar of this Court, do hereby certify that I have this day served the Motion to Affirm of Braswell Motor Freight Lines, Inc., upon the parties to this action by mailing copies thereof to:

The Solicitor General
Department of Justice
Washington, D. C. 20530

as service upon the Appellee, United States of America; to

Robert E. Ginnane, Esquire
Nahum Litt, Esquire
Office of the General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

as service upon Appellee, Interstate Commerce Commission; to

Dennis G. Lyons, Esquire
1229 Nineteenth Street, N. W.
Washington, D. C. 20036

as service upon Strickland Transportation Company, intervening plaintiff below; to

Reagan Sayers, Esquire
Clayte Binion, Esquire
Rawlings, Sayers & Scurlock
Century Life Bldg.
Post Office Box 17007
Fort Worth, Texas 76102

as service upon Appellee, Ryder Truck Lines, Inc., to

Phineas Stevens, Esquire
Suite 700—Petroleum Bldg.
Post Office Box 1250
Jackson, Mississippi 39205

and to

James Wrape, Esquire
Robert E. Joyner, Esquire
2111 Sterick Building
Memphis, Tennessee 38103

as service upon Appellees Arkansas-Best Freight System, Inc., and Gordons Transports, Inc.; to

Mert Starnes, Esquire
James, Robinson, Felts & Starnes
The 904 Lavaca Building
Austin, Texas 78701

as service upon Appellees Central Freight Lines, Inc., Red Ball Motor Freight, Inc. and Saia Motor Freight Lines, Inc.; to

Leroy Hallman, Esquire
William E. Livingstone, III, Esquire
Phinney, Hallman, Pulley & Livingstone
4555 First National Bank Building
Dallas, Texas 75202

as service upon Appellee, Herrin Transportation Company; to

W. D. Beatenbough, Esquire
Vice-President-Traffic
Ryder Truck Lines, Inc.
Post Office Box 2408
Jacksonville, Florida 32203

to

Charles L. Ford, Esquire
Texas Railroad Association
Post Office Box 1767
Austin, Texas 78767

to

Rollo E. Kidwell, Esquire
Post Office Box 10125
Dallas, Texas 75207

to

Charles D. Mathews, Esquire
Post Office Box 47407
Dallas, Texas 75247

to

Hugh T. Matthews, Esquire
Brooks, Montgomery & Matthews
630 Fidelity Union Tower
1507 Pacific Street
Dallas, Texas 75201

to

Franklin H. Wilson, Esquire
McCutchen, Black, Verleger & Shea
615 South Flower Street
Los Angeles, California 90017

and to

Theodore W. Russell, Esquire
Robert Y. Schureman, Esquire
1545 Wilshire Boulevard
Los Angeles, California 90017

as additional service upon various of the aforesaid Appellees; to

David Axelrod, Esquire
Axelrod, Goodman & Steiner
39 South LaSalle Street
Chicago, Illinois 60603

and to

Ball, Hunt, Hart & Brown
120 Linden Avenue
Long Beach, California 90802

as service upon Appellant, Consolidated Copperstate Lines; and I do further certify that such mailing was made, postage prepaid, this 27 day of March, 1969.

T. S. CHRISTOPHER
2412 Continental Life Bldg.
Fort Worth, Texas 76102
Attorney for Appellee,
BRASWELL MOTOR FREIGHT
LINES, INC.